

**BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA  
DOCKET NO. 2020-\_\_\_\_-E**

Cherokee County Cogeneration	)	
Partners, LLC	)	
	)	
Complainant,	)	
	)	<b>COMPLAINT AND REQUEST FOR</b>
v.	)	<b>INTERIM RELIEF</b>
	)	
Duke Energy Progress, LLC and Duke	)	
Energy Carolinas, LLC,	)	
	)	
Respondents.		

NOW COMES Cherokee County Cogeneration Partners, LLC (“Cherokee” or “Complainant”), pursuant to S.C. Code Ann. Section 58-27-980 and Rule 103-824 of the Rules and Regulations of the South Carolina Public Service Commission, and files this Complaint against Duke Energy Progress, LLC (“DEP”) and Duke Energy Carolinas, LLC (“DEC”) (DEP and DEC collectively, “Duke” or “Respondents”), based on their refusal to negotiate in good faith and enter into a power purchase agreement (“PPA”) with Cherokee as required by federal and South Carolina law. Cherokee requests resolution of all unresolved terms and conditions necessary for establishment of a PPA pursuant to PURPA, those orders issued in Docket Nos. 2019-184-E and 2019-185-E, and other relevant Commission Orders.

**INTRODUCTION**

This Complaint results from both Respondents’ refusal to negotiate in good faith and enter into a reasonable and appropriate successor PPA with Cherokee, the owner of a cogeneration power production facility certified as a Qualifying Facility (“QF”) under the

Public Utility Regulatory Policies Act of 1978 (“PURPA”).<sup>1</sup> Cherokee has provided energy and capacity to DEC for the past 22 years and currently provides its energy and capacity to DEC pursuant to a PPA executed in 2012 that expires on December 31, 2020 (and as filed with this Commission in Docket No. 2012-272-E).

Cherokee is entitled to sell power to Duke under PURPA, S.C. Code Ann. § 58-41-20, the Commission’s rules, and Duke’s own tariffs and schedules. Cherokee established a Legally Enforceable Obligation (“LEO”) with respect to the sale of energy and capacity to each of DEP and DEC in 2018; and has worked since then to secure a PPA with either. Cherokee has also advised Duke that it is open to providing energy and capacity to either or both Respondents in a fashion that is most beneficial to the Duke entities’ needs and their rate payers at rates that actually reflect their avoided costs.

Due to the corporate structure and affiliate relationship of DEP and DEC following their merger in 2012, Cherokee has sought to negotiate with both Duke operating utility entities and has communicated with both Respondents regarding their capacity needs. Pursuant to the commitments Respondents made to FERC in connection with their merger, both Duke entities retain their PURPA purchase and sale obligations,<sup>2</sup> but given the unique structure in which the Respondents jointly dispatch their systems yet maintain independent reserve margins, Cherokee has been willing to agree on a PPA meeting the capacity needs

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<sup>1</sup> Pub. L. 95-617.

<sup>2</sup> In response to concerns from intervenors in the Duke Energy merger with Carolina Power & Light, d/b/a/ Progress Energy Carolinas (now DEP), the applicants explained that both entities would remain subject to their PURPA obligations. *See Duke Energy Corporation, et al.*, 136 FERC ¶ 61,245 at ¶ 92 (2011) (Duke-Progress Merger Order) (“Applicants also explain that Evergreen Packaging’s statement that the Proposed Transaction will eliminate Progress Energy Carolinas as a potential buyer of QF power is incorrect because both that company and Duke Energy Carolinas will continue to exist and fulfill their PURPA obligations.”) FERC approved the merger with this understanding. *See Duke-Progress Merger Order* at ¶ 148 (“The Commission notes that Applicants’ obligations under PURPA will remain, and that Evergreen Packaging will retain its right to file a complaint with the Commission should it conclude that Applicants are not meeting those obligations.”).

of the jointly dispatched DEP and DEC system.

Contrary to their obligations under the law and PURPA, Respondents have refused to negotiate the terms of a PPA with Cherokee in good faith, despite multiple outreaches by Cherokee, by delaying for several months the timeline between discussions with Cherokee and the making of an offer, by failing to provide supporting information that would enable Cherokee to confirm whether their offers reflect avoided costs, and by failing (as Cherokee believes) to offer terms and conditions for a PPA which reflect Duke's avoided costs and are not discriminatory as to Cherokee. Cherokee seeks to compel Duke to fulfill its legal obligation to enter into a reasonable and non-discriminatory PPA with Cherokee that reflects Duke's avoided costs. Knowing that Cherokee's existing PPA expires at the end of this year, Duke has failed to provide relevant information requested by Cherokee, has drug its feet, and otherwise failed to negotiate a successor PPA, in an effort to pressure Cherokee into accepting unreasonable PPA terms.

As a result, Cherokee urgently requests that the Commission adjudicate the unresolved issues presented here on an expedited basis. Given the nature and extent of the harm that will result to Cherokee, its employees, suppliers and steam host beginning January 1, 2021 as a result of Duke dragging its feet and refusing to negotiate a successor PPA in good faith since the fall of 2018, Cherokee also requests that the Commission order DEC to extend the term of the current PPA and continue paying Cherokee for energy and capacity on the terms contained in those parties' existing PPA until the Commission has adjudicated the issues identified in this Complaint and Petition.

The Cherokee facility generates electric power and steam, with the power being sold to DEC and steam and other services are supplied to its neighbor, Reddy Ice, which

operates a plant producing ice for retail sale. Cherokee and Reddy Ice have worked together for many years and each's operations are integrated with each other. Cherokee has also been an important part of South Carolina's electric grid, providing firm capacity and electricity that can be dispatched when needed. In fact, the Cherokee facility was called on by DEC to provide energy from the facility over 70% of the time in 2019. These two Gaffney businesses employ upwards of 70 people, and face significant negative impacts, if not outright closure at the end of this year, without a new PPA.

### **BACKGROUND**

Despite Cherokee's efforts dating back to September of 2018 to secure a successor contract to the current PPA, neither Respondent has engaged in any meaningful negotiations regarding the terms of a successor contract based on avoided costs, or provided support for any of the rates and terms offered to Cherokee. DEP offered Cherokee a proposed PPA on June 24, 2020 (the "Proposed PPA"), that appeared to be a standard form PPA for solar projects, the terms of which are significantly different from Cherokee's existing PPA with DEC, and Cherokee was unable to receive meaningful support from Duke for why the rates and terms offered in the Proposed PPA were consistent with PURPA and state law. The terms of the Proposed PPA are both unreasonable and structurally unworkable for a facility such as Cherokee's, which is a dispatchable gas-fired plant that has provided Duke with firm energy and capacity for over 20 years and operates much differently than a solar QF project would.

After Cherokee repeatedly attempted to point out that the form and structure of the Proposed PPA offered in June was not appropriate for the Cherokee facility, in mid-September, 2020 (three months later), Duke personnel suggested that Duke would be

willing to agree to use the form of the existing PPA between Cherokee and DEC as a template for negotiation, in effect, extending the term of that PPA, but only at a price believed to be below avoided cost. While the most cost effective means of utilizing the energy and capacity the Cherokee facility provides to Duke is through the arrangements provided for in the existing PPA with DEC, the proposed pricing as described by Duke is believed to be so far below avoided costs as to be unworkable and could not be accepted by Cherokee.

Neither DEP nor DEC has offered Cherokee a PPA with rates and terms consistent with the requirements of PURPA and therefore, both Respondents are in violation of their obligations under PURPA, the regulations implementing PURPA issued by the Federal Energy Regulatory Commission (“FERC”), and related Commission rulings. Under PURPA, Cherokee has the right to enter into a PPA, and Duke has failed and refused to enter into such an agreement on reasonable, statutorily required terms. Duke has continued to refuse to provide Cherokee with underlying data and support necessary to confirm the avoided cost rates and reasonableness of other terms proposed by Duke are consistent with those required under PURPA, the South Carolina Energy Freedom Act, and related Commission rulings. By this Complaint, Cherokee seeks to enforce its right under federal law to commit the output and capacity of its facility to DEP or DEC at avoided cost rates determined, at Cherokee’s option, either as of the date Cherokee first established a LEO to provide such energy and capacity to Duke or at the time of delivery.

Furthermore, in the limited discussions that the parties have had, Duke has told Cherokee that if Cherokee enters into a negotiated agreement then Duke will treat Cherokee differently than if it enters into an agreement pursuant to PURPA. Specifically, DEP would

treat the Cherokee facility as a “network resource,” use its “own transmission rights,” presumably under the Duke Joint Dispatch Agreement and As-Available Capacity Agreement, to move power from the Cherokee Facility to DEP with no transmission charges being imposed on Cherokee. But, Duke has also advised Cherokee that if it asserts its legal rights and forces Duke to contract pursuant to PURPA, then Cherokee would need to obtain firm transmission rights to reach DEP, if available, and those transmission charges will be the obligation of Cherokee. Duke further informed Cherokee that Cherokee would be unable to secure firm transport capacity in order to deliver power to DEP.

Duke’s stated intention to discriminate against Cherokee with regard to the imposition of transmission charges, based on whether or not Cherokee asserts its rights under PURPA, violates PURPA's anti-discrimination provision,<sup>3</sup> is an unreasonably discriminatory act by Duke, and is an unjust, unreasonable, and/or discriminatory act that does not put Cherokee on a fair and equal footing with those resources owned by Duke in violation of the South Carolina Energy Freedom Act<sup>4</sup> and other applicable law. Consistent with this approach, the proposed PPA offered by DEP in June 2020 contains a provision whereby, under certain circumstances, Cherokee would waive its rights to contract with DEP under PURPA. It is neither reasonable nor appropriate to require Cherokee, in order to secure a PPA, to waive the only legal right it has to compel Duke to contract with it for the purchase of power, i.e., to leave itself entirely at the mercy of Duke to act fairly, reasonably and in good faith in its dealings with Cherokee.

In support of its Complaint, Cherokee respectfully shows the Commission the following:

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<sup>3</sup> 16 U.S.C. § 824a-3(b).

<sup>4</sup> S.C. Code Ann. § 58-41-05, *et seq.*

## PARTIES

1. Cherokee is a limited liability company organized under the laws of the State of Delaware.

2. Cherokee's legal representative in this proceeding, to whom all notices, pleadings and other documents related to this proceeding should be directed, is:

John J. Pringle, Jr.  
Adams and Reese LLP  
1501 Main Street, 5th Floor  
Columbia, SC 29201  
Phone: (803) 343-1270  
Fax: (803) 779-4749  
[jack.pringle@arlaw.com](mailto:jack.pringle@arlaw.com)

Cherokee consents to electronic service in this proceeding.

3. Respondents Duke Energy Progress, LLC and Duke Energy Carolinas, LLC are electric public utilities organized, existing and operating under the laws of the State of North Carolina for the purposes of generating, transmitting, and distributing electricity in their respective service territories. Respondents are operating subsidiaries of Duke Energy Corporation. DEP's service area include parts of central and western North Carolina and northeastern South Carolina. DEC's service area includes parts of central and western North Carolina and western South Carolina. DEP's principal office is located at 410 S. Wilmington Street, Raleigh, North Carolina 27601. DEC's principal office is located at 526 South Church Street, Charlotte, North Carolina 28202.

4. This Commission has jurisdiction over this subject matter and the parties.

5. This Commission is a State regulatory agency having oversight and ratemaking authority as to Respondents.<sup>5</sup> PURPA provides that each state regulatory authority shall

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<sup>5</sup> S.C. Code Ann. § 58-27-10, *et seq.*

implement FERC rules concerning purchases from qualifying facilities for each electric utility for which it has ratemaking authority.<sup>6</sup> Therefore, under both the South Carolina Energy Freedom Act and PURPA, the Commission has jurisdiction, authority and the responsibility to enforce FERC rules implementing PURPA, including the obligation of DEP and/or DEC to pay its avoided costs for energy and capacity provided by Cherokee.

The United States Supreme Court has interpreted PURPA and the FERC regulations to mean that a state regulatory authority, in implementing PURPA and the federal regulations, must apply the avoided-cost rule in the absence of a waiver granted by FERC or a specific contractual agreement setting a price that is lower than the avoided cost.

*State ex rel. Utilities Comm'n v. North Carolina Power*, 338 N.C. 412, 417, 450 S.E.2d 896 (1994), citing *American Paper Inst. v. American Elec. Power*, 461 U.S. 402, 76 L. Ed. 2d 22, 103 S. Ct. 1921 (1983).

6. On information and belief, DEP and DEC operate under integrated dispatch, using their resources collectively to serve their respective ratepayers at the lowest cost and greatest efficiency. Cherokee is informed and believes that DEP and DEC are required to operate in a coordinated manner and to plan their collective system in such a way as to take advantage of efficiencies and economies of scale.<sup>7</sup>

## BACKGROUND

7. Cherokee owns and operates an existing 98 MW combined cycle power generating facility in Cherokee County, South Carolina (“the Cherokee facility”), which is

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<sup>6</sup> 16 U.S.C. § 824a-3(f).

<sup>7</sup> “DEC and DEP plans are determined simultaneously to minimize revenue requirements of the combined jointly dispatched system while maintaining independent reserve margins for each company.” Duke Energy Carolinas South Carolina 2017 Integrated Resource Plan (Annual Report) filed September 1, 2017, Docket No. 2017-10-E at p. 11. Since DEP and DEC operate under a “combined jointly dispatched system,” Cherokee is amendable to also selling some portion of its output to DEC on substantially the same terms and conditions as it would sell its energy and capacity to DEP if such an arrangement is more beneficial on a system-wide basis. *See also* Duke-Progress Merger Order at FN 3 (“Pursuant to the [Joint Dispatch Agreement], Duke Energy Carolinas, LLC and Progress Energy Carolinas, Inc. will jointly dispatch their generation fleets in order to operate their systems more economically for the benefit of their customers.”)(Internal quotations removed).

located between Charlotte, North Carolina and Spartanburg, South Carolina. The Cherokee facility is a cogeneration facility providing steam and other services to an industrial facility and, as noted above, is a Qualifying Facility, as that term is defined in Section 210 of PURPA.<sup>8</sup> The Cherokee facility has reliably provided energy and capacity to DEC for the past 22 years, most recently pursuant to a PPA approved by this Commission in Docket No. 2012-272-E, and Cherokee seeks to continue providing capacity and energy to DEP and/or DEC under a successor PPA. The Cherokee facility provides firm capacity and is a dispatchable gas-fired facility. Cherokee's current PPA with DEC is a "dispatchable" agreement under which Cherokee makes its energy and capacity available to Duke on a firm basis in exchange for a fixed monthly payment and Duke communicates to Cherokee when it needs energy, which is consistent with how Duke dispatches and recovers costs from its owned facilities. As noted above, in 2019 the Cherokee Facility was called by DEC to provide energy over 70% of the time. As detailed below, in 2018 Cherokee established LEOs with both DEP and DEC pursuant to PURPA. Cherokee is capable of delivering energy and capacity to either DEP or DEC.

8. S.C. Code Ann. § 58-37-40 requires each electric utility to prepare and submit to the Commission an integrated resources plan (IRP) at least every three years and containing the specific information in that statute. Pursuant to that statute, DEP and DEC have submitted integrated resource plans and stated in recent integrated resource planning ("IRP") proceedings before the Commission that they need capacity and energy over at least the next 15 years. Likewise, the most recent avoided cost rates approved by the Commission for DEP and DEC include both energy and capacity components for a contract term of ten

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<sup>8</sup> 18 U.S.C. § 824a-3.

(10) years. . Thus, there is no question that both Respondents have a continuing need for energy and capacity over the next ten years and Duke will experience avoided costs for both energy and capacity by contracting with Cherokee.

9. Pursuant to Section 210 of PURPA, DEP and DEC are legally obligated to purchase Cherokee's energy and capacity at their respective avoided costs. FERC's implementing regulations allow QFs to either sell their output "as available" or pursuant to an LEO.<sup>9</sup> FERC has held that, "by committing itself to sell to an electric utility, [the QF] also commits the electric utility to buy from the QF; these commitments result in contracts or in non-contractual, but binding, legally enforceable obligations."<sup>10</sup> When a QF establishes a LEO, the QF may choose to sell its energy and capacity at the utility's avoided cost rate as of the time of delivery or at the time the LEO was established with the utility.<sup>11</sup> Cherokee established LEOs with both Respondents in 2018 and the rates for energy and capacity would be based on the utility's avoided costs calculated as of the specific date Cherokee established the LEO with the purchasing utility.

10. In addition to giving QFs the right to sell their output to a utility, PURPA and FERC's implementing regulations also give a QF the right to agree to transmit its energy and capacity to any other electric utility.<sup>12</sup> If a QF is willing to transmit its output to a utility, and once the QF's output is delivered to the utility, the PURPA obligation to purchase capacity and energy is the same as if the QF were directly interconnected to the utility.<sup>13</sup> As described above, in the limited discussions the parties have had, and with

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<sup>9</sup> 18 C.F.R. § 292.304(d).

<sup>10</sup> *JD Wind I, LLC*, 129 FERC ¶ 61,148, at p 25 (2009).

<sup>11</sup> 18 C.F.R. § 292.304(d).

<sup>12</sup> *See* 18 C.F.R. § 292.303(d).

<sup>13</sup> *See id.* ("If a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any other electric utility. Any electric utility to which such energy or capacity is transmitted ***shall purchase such energy or***

regard to transmission, Duke has told Cherokee that if Cherokee enters into a negotiated agreement then Duke will treat Cherokee as a “network resource,” use its “own transmission capacity,” and no transmission charges would be imposed for delivery of Cherokee’s power to DEP or DEC.

Cherokee thus understands that adequate transmission arrangements are available for delivery of its output to DEP. But, as noted above, Duke also advised Cherokee that if it asserts its rights and forces DEP to contract pursuant to PURPA, then transmission capacity would need to be procured by Cherokee, which according to Duke would not be available for purchase, and the cost of such transmission if it was available would be incurred by Cherokee. Duke’s stated intent to discriminate against Cherokee by imposing transmission requirements, based on whether Cherokee asserts its rights under PURPA, violates PURPA’s anti-discrimination provision and is an unjust, unreasonable, and/or discriminatory act that does not put Cherokee on a fair and equal footing with those resources owned by Duke in violation of the South Carolina Energy Freedom Act.<sup>14</sup> . The apparently selective use of the leverage associated with Duke’s effective monopoly control of the relevant transmission capacity is unreasonable and discriminatory.

Cherokee’s current PPA with DEC does not impose any transmission charge on Cherokee, because that facility is located in DEC’s service territory. Under the PPA recently proposed by DEP in June 2020, the charge for delivering power to the DEP/DEC interface would be ~\$3.3 million per year and would significantly impact the economic viability of Cherokee. . The transmission requirement is yet another aspect of the Proposed

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*capacity as if the qualifying facility were supplying energy or capacity directly to such electric utility.”*(Emphasis added).

<sup>14</sup> S.C. Code Ann. § 58-41-05, *et seq.*

PPA that evidences the lack of good faith, and that Duke is treating PURPA contracts and non-PURPA contracts differently.

### **THE PROPOSED PPA**

11. In 2018, Cherokee notified Duke of Cherokee's desire to negotiate a new PPA and submitted a term sheet proposal to DEC ("DEC Term Sheet"). That term sheet offered to provide energy and capacity from the Cherokee facility to DEC at a rate believed to be below DEC's avoided costs.

12. On September 17, 2018, Cherokee submitted an executed Notice of Commitment to Sell the Output of a Qualifying Facility to DEC with respect to Cherokee's 98 MW facility, which currently sells its full output to DEC. That Notice and cover letter constituted a LEO and establish September 17, 2018 as Cherokee's LEO date with DEC. Copies of those papers are attached and labeled as Cherokee Exhibit 1. Pursuant to Cherokee's election under Section 292.304(d) of FERC's regulations, the applicable purchase price would be DEC's avoided costs as of the date of that LEO, or as of the date of delivery, at Cherokee's option. As noted above and in the cover letter transmitting the Notice of Commitment to DEC, Cherokee is amenable to having the total output of energy and capacity from its facility apportioned between DEC and DEP, if such an arrangement is more beneficial to both Duke on a system-wide basis, and Cherokee.

13. Consistent with its willingness to provide its capacity and energy to Duke in the fashion that allows for its most efficient use by DEC and/or DEP as a "network resource," on December 12, 2018, Cherokee submitted to DEP an executed Notice of Commitment to Sell the Output of a Qualifying Facility with respect to Cherokee's 98 MW cogeneration facility. The Notice and cover letter constitute a Legally Enforceable

Obligation and establish December 12, 2018, as Cherokee's LEO date with DEP.<sup>15</sup> Copies of those papers are attached and labeled as Cherokee Exhibit 2. A power purchase agreement with Cherokee would enable DEP and/or DEC to avoid significant energy **and** capacity costs over a 15-year term, and indeed, depending on circumstances, could be renewed to extend the availability for a longer period, saving Duke (and their ratepayers) additional amounts.

14. Duke acknowledged receipt of Cherokee Exhibits 1 and 2 but denies that Cherokee has established an LEO with either DEP or DEC. Cherokee disputes that denial.

15. While Cherokee has had limited discussions with Duke since then regarding a new PPA, and Duke has proposed certain rates that are purported to be avoided costs, Duke has failed to negotiate terms with Cherokee in a good faith and non-discriminatory fashion and has failed to provide the requested support showing that the rates proposed by Duke, in fact, reflect Duke's avoided costs. By way of example, Duke failed and refused to provide detailed support for its avoided cost calculations, as requested by Cherokee in letters dated April 30, 2019, and May 4, 2020, and likewise failed to enter into any discussions with Cherokee regarding proposed PPA terms provided by Cherokee to DEC

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<sup>15</sup> *FLS Energy, Inc.* 157 FERC ¶ 61,211 (2016) (noting that FERC precedent established that "a legally enforceable obligation turns on the QF's commitment, not the utility's actions" (quoting *JD Wind I, LLC*, 129 FERC ¶ 61,148, at P 25 (2009), *reh'g denied*, 130 FERC ¶ 61,127 (2010) ("[A] QF has the option to commit itself to sell all or part of its electric output to an electric utility . . . Accordingly, a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.")); *Hydrodynamics Inc.*, 146 FERC ¶ 61,193, at 61,845 (2014) (finding that "a State utilities commission rule requiring a QF to win a competitive solicitation as a condition to obtaining a long-term contract impose an unreasonable obstacle to obtaining a legally enforceable obligation in violation of PURPA's regulations.")). *See also Final Rule Regarding the Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880 *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part & vacated in part sub nom. Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983) ("[u]se of the term 'legally enforceable obligation' is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility.")).

on December 7, 2018, and to DEP on April 9, 2020. Absent access to the requested data, which Duke refuses to provide, Cherokee cannot have meaningful negotiations with Duke. In addition, and as noted above, the issue of whether Duke would impose transmission charges on Cherokee is significant, as the discriminatory imposition of such charges would impose a significant and inappropriate additional cost burden on Cherokee.

16. After months of silence, on June 24, 2020, DEP provided the Proposed PPA to Cherokee. There are a number of aspects of the proposal which are unreasonable, uneconomic and otherwise do not comport with PURPA or other applicable law and regulation, as further described in paragraph 24.

17. As of the date of this Complaint and Petition, neither DEP nor DEC has engaged in good faith negotiations with Cherokee. Instead, the Proposed PPA offers rates and terms for a PPA with DEP that are inconsistent with PURPA and pertinent Commission rulings. By virtue of the lack of good faith negotiations with Respondents, and based solely on the Proposed PPA provided by DEP in June, the Proposed PPA's terms and rates are inconsistent with DEP's stated need for capacity, DEP's obligations under PURPA and the Commission's Orders in Dockets 2019-184-E and 2019-185-E (the "Avoided Cost Orders") relating to avoided costs and methods that are inappropriate for use in calculating avoided costs when negotiating with a QF such as Cherokee.

The terms of the Proposed PPA are discriminatory and unreasonable as to the Cherokee Facility, which is a dispatchable gas-fired QF, providing firm energy and capacity on a year-round basis. On information and belief, the rates provided for in the Proposed PPA would not pay DEP's avoided costs to Cherokee. The form and structure of the Proposed PPA may be appropriate for an intermittent resource, such as a solar

facility, but are inappropriate and unworkable for the Cherokee facility. DEP has offered a PPA that it knows cannot work for the Cherokee facility, as it provides for a payment structure that is neither reasonable nor appropriate for a dispatchable gas-fired facility that provides firm capacity – as evidenced by the fact that Cherokee facility has historically run over 70% of the time. The Proposed PPA is structured such that the payments for providing firm capacity to Duke would be associated with providing energy only during the periods of time as outlined in this table, even though the Cherokee facility provides firm capacity on a year-round basis.

Capacity Credit Hours	
July-August	4pm to 8pm
December-March	6am-to 9am 6pm-to 9pm

It is absurd for Duke to utilize the resource that is the Cherokee facility, which provides firm capacity 24/7/365, in this fashion, which would require Cherokee to generate power and DEP to take power, without regard to whether Duke needs the power at that time.

This treatment is unreasonable and discriminatory for a resource that is capable of providing firm capacity and energy on a year round basis. Energy should be dispatched based on system needs and based on lowest system cost, as Cherokee's facility is dispatched by Duke under the current PPA agreement. Requiring Cherokee to operate and to supply energy to Duke when less costly resources may be available at times only

increases costs for Duke rate payers while not changing the capacity available to Duke from a resource adequacy and reserve margin perspective.

The best evidence of the most efficient way for Duke to utilize the energy and capacity provided by Cherokee is how DEC and Cherokee now operate under the existing PPA. DEP's Proposed PPA would have his facility be operated in a completely different fashion, and different than how either Respondent is presumed to operate its own facilities to achieve the lowest system cost for ratepayers.

Duke recently suggested that it might be willing to use the form of the existing PPA with Cherokee for a successor PPA, which would be a significant improvement over the Proposed PPA and would make the most efficient use of Cherokee's facility. However, a PPA based on that form has not been offered to Cherokee. In addition, as noted above, Duke's willingness to do so may be coupled with proposed rates which are believed to be far below avoided cost and would not be economically feasible for Cherokee.

**FIRST CLAIM**  
**Failure to Offer the Option of a Contract and Rates Derived by**  
**Free and Open Negotiations**

19. The allegations contained in paragraphs 1 - 18 of this Complaint and Petition are realleged and incorporated herein by reference as if fully set forth.

20. Neither Respondent has negotiated with Cherokee freely, openly, and in good faith with respect to payment of its full avoided costs, including both capacity and energy components over a specified term consistent with Respondents' obligations under PURPA and as articulated by this Commission in Commission Order No. 85-347 issued in Docket No. 80-251-E.

21. Respondents failed to offer Cherokee the option of a contract and rates derived by transparent, free and open negotiations as provided for in the Commission's Orders in the avoided cost proceedings in Docket Nos. 2019-184-E and 2019 185-E.

## **SECOND CLAIM**

### **Request for Resolution**

22. The allegations contained in paragraphs 1-21 of this Complaint and Petition are realleged and incorporated herein by reference as if fully set forth.

23. As of the date of this Complaint, Cherokee and neither Respondent have resolved the issues necessary to reach agreement on a new PPA. Disputed issues regarding a PPA are subject to a complaint proceeding before the Commission. .

24. At a minimum, the issues to be resolved by the Commission are the following:

- (1) Avoided Cost - Whether Respondents have negotiated transparently, freely, openly, and in good faith with respect to payment to Cherokee of their full avoided costs, including both capacity and energy components, and whether Respondents have supported their calculation of avoided costs? As explained in detail above, Cherokee contends that Respondents have not done so.
- (2) Form of Contract – Whether the structure of the Proposed PPA with regard to dispatch is reasonable? The Proposed PPA is not appropriate for Cherokee's dispatchable facility. Under the current PPA between Cherokee and DEC, which is a structure preferred by both Cherokee and DEC and has been acknowledged as such by DEC, DEC elects when Cherokee dispatches, delivers the gas and takes the power generated by Cherokee. Under the Proposed PPA, which is tailored more to an intermittent solar or must-run facility, Cherokee is to provide a schedule to Duke and Duke does not get to elect when it would be most useful for Cherokee to provide power. The structure of Cherokee's existing PPA with DEC is mutually beneficial to both parties and Duke's customers and creates a structure where Duke controls when it will receive power. Duke has recently communicated a potential willingness to utilize the form of the existing PPA with DEC, but only at a price believed to be below its avoided cost – with no payment for capacity for the first five years of a ten year contract term – resulting in revenues to Cherokee at least 40% less than what DEC is paying under the existing PPA. If ever actually offered, Cherokee could not accept such rates and terms as they are non-compensatory and economically infeasible.

- (3) Capacity Payments – Whether the Proposed PPA’s provision for payment to Cherokee for capacity on an as-delivered basis is reasonable? Payment for capacity on an as-delivered basis may be appropriate for an intermittent wind or solar facility due to the uncertainty of generation output but is a flawed and inappropriate methodology for a dispatchable gas-fired facility, like the Cherokee QF, that provides capacity on a firm basis similar to most of DEC and DEP’s own assets. For a facility that can be dispatched on a firm basis, Cherokee’s facility should be recognized for the capacity (MW) that is available to dispatch rather than energy delivered, consistent with how Duke recognizes in reserve margin calculations and recovers costs of its owned facilities. As a result, the structure of the Proposed PPA means that the payments do not reflect the avoided cost of capacity. This inefficient and wasteful payment structure would not be good for either Cherokee or DEP, and is contrary to the public policy goal of addressing renewable energy issues in a “fair and balanced manner.”<sup>16</sup>
- (4) Term of Contract - Whether the term of the Proposed PPA is reasonable? Duke has advised Cherokee, without support, that they only offer five-year PURPA contracts to large QFs like Cherokee. The recent communications suggest that a PPA in the form of the existing PPA with DEC with a ten year contract term could be possible, but with rates that would not include capacity payments and are otherwise believed to be so far below avoided cost as to be economically infeasible for Cherokee. A PPA containing such rates and terms has not been offered to Cherokee. The five-year term of the Proposed PPA is arbitrary and discriminatory against Cherokee as Duke has provided 10-year fixed pricing to other QFs and the previous and current agreements between Cherokee and Duke were 15 and 7.5 years, respectively. Cherokee has expressed its willingness to Duke to enter into a new contract term of at least ten years to meet its future capacity needs. Duke’s stated five-year limitation would also conveniently restrict Cherokee from filling the capacity need that DEP and DEC forecast in both their 2018 and 2020 IRP filings for 2026 through 2030, which need Duke apparently plans to meet with its own new gas-fired generation.
- (5) Joint Dispatch - Whether the Proposed PPA takes advantage of Duke’s obligation to jointly dispatch the DEP and DEC systems? The Proposed PPA does not account for Duke’s obligation to jointly dispatch the DEP and DEC systems to maximize benefits to Duke ratepayers. Duke could maximize the value its ratepayers receive from Cherokee by 1) (a) utilizing Cherokee to provide energy and capacity to DEP’s system from December through March and (b) utilizing Cherokee to provide energy and capacity to DEC’s system from April through November, given the differing capacity and energy needs and costs of each system. As Duke notes in its most recent IRP filings, a jointly operated system scenario “allowed preferential reliability support between DEC and DEP to share capacity, operating reserves and demand response capability.”

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<sup>16</sup> S.C. Code Ann. Section 58-41-05.

- (6) No Carbon Pass-through - Whether the Proposed PPA appropriately provides for future carbon dioxide emission costs? The Proposed PPA states in Section 7.2 that carbon dioxide allowances are part of the seller's responsibilities. However, Duke's avoided cost filing specifically says that they do not include the cost of carbon dioxide allowances in the avoided cost because no legislation requiring such currently exists. To the extent a carbon dioxide allowance or tax program is required in South Carolina, or as part of a regional or federal program in which South Carolina participates during the term of the PPA, the Proposed PPA would require Cherokee to sell power at rates believed to be below DEP's avoided cost. This proposed PPA term is inconsistent with PURPA's requirement that the utility pay its avoided costs and discriminatory against Cherokee, as Duke's alternative of running its own or other PPA resources would include a carbon cost that would be passed on to ratepayers, whereas running Cherokee would not.

Pursuant to PURPA and the guidance articulated by the Commission in the Avoided Cost Orders and other Orders relevant to the issues presented here, Cherokee respectfully requests that the Commission hear all unresolved issues necessary for formation of a PPA between Cherokee and a Respondent based on that Respondent's actual avoided costs, including both capacity and energy components, and an appropriate contract term.

#### **REQUEST TO EXTEND THE TERM OF THE PARTIES' CURRENT PPA**

As noted above, Cherokee's existing PPA with DEC expires on December 31, 2020. Despite Cherokee initiating discussions nearly two years ago, the process has been delayed by Duke's lack of responsiveness to requests for supporting information and its unwillingness to engage in meaningful, good-faith negotiations with Cherokee. Cherokee is concerned about a delay in the complaint process and the potential impacts to Cherokee and its customers, workers and suppliers, and the Reddy Ice plant, which relies on steam and other services from Cherokee's QF to operate, if a successor contract renewal is not executed and approved before the end of this year. Duke has not been willing to engage

in meaningful negotiations over the past two years and the Proposed PPA offered in June raises a number of issues, including those detailed above.

Given the issues presented here, and the irreparable harm that would result as to the Cherokee facility from the loss of revenues beginning January 1, 2021 as a result of Duke's refusal to negotiate in good faith since the fall of 2018, Cherokee requests that the Commission order DEC to continue paying Cherokee for energy and capacity on the same terms contained in those parties' existing PPA until the Commission has adjudicated the issues identified in this Complaint.

Accordingly, Cherokee requests that the Commission exercise the authority granted by S.C. Code Ann. § 58-27-980 and set out in Section 14.4. of the parties' existing PPA to extend the term of the parties' existing PPA during the pendency of this proceeding as appropriate.

**WHEREFORE**, Cherokee County Cogeneration Partners, LLC respectfully requests that the Commission:

1. Find and conclude that Respondents did not engage in free, open, and good faith negotiations with Cherokee regarding the needs of DEP and/or DEC for future capacity and their respective actual avoided costs, including both capacity and energy components;
2. Consider this course of dealing in determining Respondents' avoided costs, including both capacity and energy components, during the hearing process;
3. Resolve the unresolved issues necessary for formation of a power purchase agreement between Cherokee and Respondent;

4. Resolve the unresolved issues consistent with the positions of Cherokee on those issues;

5. Provide the interim relief requested herein, by ordering DEC to continue paying Cherokee for energy and capacity on the same terms contained in those parties' existing PPA until the Commission has ruled on the issues identified in this Complaint and Petition; and

6. For such other and further relief as the Commission deems just and proper.

Respectfully submitted,

By: s/John J. Pringle, Jr.  
John J. Pringle, Jr.  
Adams and Reese LLP  
1501 Main Street, 5th Floor  
Columbia, SC 29201  
Phone: (803) 343-1270  
Fax: (803) 779-4749  
[jack.pringle@arlaw.com](mailto:jack.pringle@arlaw.com)

*Attorneys for Cherokee County  
Cogeneration Partners, LLC*

**VERIFICATION**

Carolyn Murff, being first duly sworn, depose and says that he/she is Vice President of the Cherokee County Cogeneration Partners, LLC, Petitioner in the above-entitled matter, that he/she has read the foregoing Complaint and Petition, and believe its contents to be true and accurate to the best of my knowledge, except as to those matters and things therein alleged upon information and belief, which he/she believes to be true.

This the 31 day of October, 2020.



STATE OF

New Jersey

COUNTY OF

Mercoer

Sworn to and subscribed before me

this the 31 day of July, 2020

by

Carolyn Murff



Notary Public

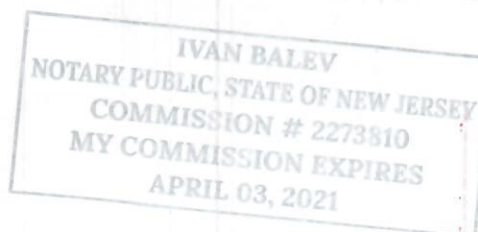
Printed Name:

Ivan Balev

My Commission Expires:

04/03/2021

(OFFICIAL SEAL)



**BEFORE**  
**THE PUBLIC SERVICE COMMISSION OF**  
**SOUTH CAROLINA**  
**DOCKET NO. 2020-\_\_\_\_-E**

Cherokee County Cogeneration Partners, LLC	)	<b>CERTIFICATE OF SERVICE</b>
	)	
Complainant,	)	
	)	
v.	)	
	)	
Duke Energy Progress, LLC and Duke Energy Carolinas, LLC,	)	
	)	
Respondents.	)	

This is to certify that I have caused to be served today, the **Complaint and Request for Interim Relief** to the individuals listed below via first class mail and electronic mail to the addresses on file with the Public Service Commission:

Andrew M. Bateman Office of Regulatory Staff 1401 Main Street, Suite 900 Columbia, SC 29201 <a href="mailto:abateman@ors.sc.gov">abateman@ors.sc.gov</a>	Frank R. Ellerbe III Robinson Gray Stepp & Laffitte Post Office Box 11449 Columbia, SC 29211 <a href="mailto:fellerbe@robinsongray.com">fellerbe@robinsongray.com</a>
Heather Shirley Smith Deputy General Counsel Duke Energy Carolinas, LLC 40 W. Broad Street, Suite 690 Greenville, SC 29601 <a href="mailto:heather.smith@duke-energy.com">heather.smith@duke-energy.com</a>	Rebecca J. Dulin Duke Energy Carolinas, LLC 1201 Main Street, Suite 1180 Columbia, SC 29201 <a href="mailto:Rebecca.Dulin@duke-energy.com">Rebecca.Dulin@duke-energy.com</a>
Jeffrey M. Nelson Office of Regulatory Staff 1401 Main Street, Suite 900 Columbia, SC 29201 <a href="mailto:jnelson@ors.sc.gov">jnelson@ors.sc.gov</a>	Samuel J. Wellborn Robinson Gray Stepp & Laffitte, LLC Post Office Box 11449 Columbia, SC 29211 <a href="mailto:swellborn@robinsongray.com">swellborn@robinsongray.com</a>
Becky Dover, Esquire Carri Grube - Lybarker, Esquire SC Department of Consumer Affairs P.O. Box 5757 Columbia, SC 29250 <a href="mailto:clybarker@scconsumer.gov">clybarker@scconsumer.gov</a> <a href="mailto:bdover@scconsumer.gov">bdover@scconsumer.gov</a>	

s/ John J. Pringle, Jr.  
John J. Pringle, Jr.

November 2, 2020